

The Honorable John C. Coughenour

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

JAMES S. GORDON, Jr., a married
individual, d/b/a
'GORDONWORKS.COM',

Plaintiff,

v.

VIRTUMUNDO, INC, a Delaware
corporation d/b/a
ADNOWLEDGEMAIL.COM;
ADKNOWLEDGE, INC., a Delaware
corporation, d/b/a
ADKNOWLEDGEMAIL.COM;
SCOTT LYNN, an individual; and
JOHN DOES, 1-X,

Defendants.

No. CV06-0204JCC

**REPLY IN SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS FOR LACK OF
PERSONAL JURISDICTION
PURSUANT TO FED. R. CIV.
P. 12(b)(2)**

NOTE ON MOTION CALENDAR:
April 7, 2006

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1 **I. INTRODUCTION**

2 Defendants Virtumundo, Inc. (“Virtumundo”), Adknowledge, Inc.
3 (“Adknowledge”), and Scott Lynn (collectively “Defendants”) should be
4 dismissed from this lawsuit for lack of personal jurisdiction¹. Plaintiff’s
5 Response in Opposition to Motion to Dismiss (Dkt. No. 11, the “Opposition”)
6 contains numerous inconsistencies, mischaracterizations and inaccurate
7 citations to his own unsubstantiated declarations. For example, the
8 Opposition “categorically” claims Plaintiff never opted-in to receive emails,
9 whereas he testifies in his declaration (Dkt. No. 11 at 2:5-8) that he did opt-
10 in.

11 Plaintiff has supplied only a handful of emails, the majority of which
12 have nothing to do with any of the defendants. Plaintiff relies on only two
13 emails from Defendant Virtumundo, which do not demonstrate purposeful
14 availment. He does not contend in his Opposition that any of the other
15 defendants sent him any email messages.

16 Plaintiff argues that Defendants purposefully availed themselves
17 because he sent emails to various email addresses at “virtumundo.com”, but
18 he admits he refused to unsubscribe through the unsubscribe link provided on
19 Virtumundo emails. 15 U.S.C. § 7701 *et seq.* (“CAN-SPAM”) provides that an
20 unsubscribe link is the federally mandated means to opt-out of receiving
21 commercial emails. CAN-SPAM puts the onus on email marketers and
22 recipients to follow the unsubscribe process in order to put the sender on
23 notice that the recipient wishes to opt-out. Virtumundo was entitled to rely
24 on CAN-SPAM in managing its email lists, and Plaintiff’s alleged
25 communication(s) other than “in a manner specified in the [commercial email]

26
27 ¹Subsequent to filing his Opposition, Plaintiff filed a First Amended Complaint. The
28 jurisdictional facts are materially the same and Defendants request that the Court deem the
underlying Motion to apply to the First Amended Complaint.

1 message” is insufficient to constitute notice. 15 U.S.C. § 7704(a)(3)(A)(i).
2 Emails to random addresses at “virtumundo.com” fail to put any defendant on
3 jurisdictional notice because even if Plaintiff sent them, the defendants never
4 received them.

5 Finally, Plaintiff lumps each of the defendants together as a single
6 entity, but alleges *no facts* relevant to any defendant other than Virtumundo.
7 The motion to dismiss by defendants other than Virtumundo should be
8 granted because it is effectively unopposed. Virtumundo should be dismissed
9 because it could not have foreseen being haled into court here.

10 11 **II. ARGUMENT AND AUTHORITY**

12 **A. Plaintiff’s Evidence is Fundamentally Flawed.**

13 The facts alleged in support of Plaintiff’s Opposition are inconsistent
14 and unsupported. Plaintiff’s only evidence of putting any defendant on
15 jurisdictional notice is a self-serving declaration claiming he sent 200 emails
16 to various email addresses at the Virtumundo.com domain (but to no other
17 defendants), and that he registered his residency at the website located at
18 WAISP.org. However, Plaintiff fails to attach a single email or any other
19 evidence substantiating his claims. Moreover, the law does not impose a
20 burden on foreign residents to query the WAISP.org website. *See e.g.,*
21 *Cybersell v. Cybersell*, 130 F.3d 414 (9th Cir. 1997) (court does not have
22 jurisdiction over defendant in trademark owner’s home state even though
23 defendant could have searched the United States trademark office database
24 to determine trademark owner’s residency).

25 *1. Plaintiff’s opposition and supporting declaration contain* 26 *material inconsistencies and constitute a Rule 11 violation.*

27 Plaintiff’s declarations contain blatant inconsistencies and his
28 Opposition contains material falsehoods. The Opposition falsely states that

Plaintiff “wholly” and “categorically” denies having subscribed to receive emails. Opposition at pp. 3:3 & 4,n.1 (Dkt. No. 11). However, Plaintiff testifies explicitly in his declaration that “**this next sentence is not true - italicized**) [*Plaintiff has*] never ‘opted-in’, ‘subscribed’, or ‘co-registered’, in any manner with Virtumundo nor, to my knowledge, any of their ‘affiliates’, or ‘partners’.” Gordon Decl. (Dkt. 12) at ¶ 4 (emphasis in original)². Plaintiff subsequently filed a second Declaration omitting the false statement. See Second Gordon Decl., Dkt. 16 at ¶ 4. However, Plaintiff did not bother to correct the material misstatement in the Opposition and, instead, asserts the false statement emphatically. This falsehood calls into question Plaintiff’s veracity and the reliability of all of his unsupported testimony.

The Opposition proffers that Plaintiff sent cease and desist memos to Virtumundo “literally thousands of times.” Opposition at p. 3:25. However, the Gordon Decl. contradicts the Opposition by limiting the number of such memos to “approximately 200 direct requests to Virtumundo to cease and desist.” Gordon Decl. at ¶ 7. This inconsistency and the lack of documentary support for the Opposition speak for themselves. Indeed, Plaintiff testifies he sent 200 requests, but he does not attach any copies of such requests, and he fails to cite a single specific occasion when he sent any communication to Virtumundo or any other defendant.

2. *Most emails attached to Plaintiff’s declaration are irrelevant.*

The emails attached to Plaintiff’s declaration (Dkt. No. 16) are either irrelevant, inadmissible, and/or without authentication. For example, emails

²Defendants have evidence which indicates that recipients from the Gordonworks.com domain opted-in to receive emails from computers located in Richland, WA. Plaintiff Gordon admits that he resides in Benton County, WA, which includes Richland. First Amended Complaint at ¶ 1.1.

1 from unrelated third parties from domains like “03.mdsa.com” (page 11³),
 2 “g.ew01.com”(page 12), “b.hm02.com”(page 13), “mindsharedesign.com”(page
 3 16), and “prefersend.com” (page 23-24) are not in the least bit germane to this
 4 matter. Plaintiff’s reliance on an email to an unrelated recipient, “5-
 5 katie@ehahome.com”(page 26-27), is peculiar considering the recipient of the
 6 email is not a party or witness to this case.

7 Plaintiff does not explain the relevance of these emails and the Court
 8 should disregard them. In truth, Plaintiff acknowledges that he is relying on
 9 “email ads from Virtumundo *and other spammers.*” Gordon Decl. at ¶ 5
 10 (emphasis added). It is axiomatic that alleged unlawful conduct by other
 11 parties is not relevant to a lawsuit against specific defendants. Similarly,
 12 Plaintiff relies on a generic memo to an unnamed “Email Marketer”, but
 13 supplies no evidence that this memo was sent to any defendant, other than
 14 his self-serving declaration that the letter is an “example request.” Gordon
 15 Decl. at ¶ 7. Like the emails to “other spammers” the Court should disregard
 16 the generic memo.

17
 18 *3. Plaintiff does not allege any facts relating to Defendants
 other than Virtumundo.*

19 The only evidence Plaintiff submits pertaining to any defendant in this
 20 matter are a few emails apparently from Virtumundo, which are insufficient
 21 to establish any jurisdictional nexus. Gordon Decl. at page 14-15, 18.
 22 Plaintiff does not attach or claim to have received emails from any other
 23 defendant. Ironically, Plaintiff attempts to distinguish this case from the
 24 recent Utah Supreme Court decision in *Fenn v. Mleads Enterprises, Inc.*, 2006
 25 UT 8; 545 Utah Adv. Rep. 7 because “that case involved the sending of only
 26 one (1) single email by” the defendant. However, in the present matter,
 27

28 ³Citations to page numbers are to the Gordon Decl. (Dkt. 16).

1 Plaintiff only supplies two emails related to one of the defendants in this
2 lawsuit⁴, and no emails from any other.

3 Plaintiff attempts to impeach Defendants' Motion because Defendants
4 "nowhere flatly deny Plaintiff received the emails in question." However,
5 Plaintiff has supplied only the few emails attached to his declarations, most
6 of which are wholly irrelevant to any Defendant. Moreover, sending emails to
7 recipients who have opted-in to receive email solicitations or have not
8 unsubscribed to email lists is not unlawful. In light of Plaintiff's constructive
9 admission that he opted-in to receive emails, Virtumundo had the right to
10 send Plaintiff these messages, and Plaintiff's efforts to cast the defendants in
11 a negative light ring hollow.

12 **B. Plaintiff's Authority Does Not Support His Opposition.**

13 Consistent with his approach to the facts, Plaintiff cites to law which
14 does not stand for the propositions for which they are cited. For example,
15 Plaintiff relies heavily on an order by Judge Zilly which purportedly supports
16 his Opposition. However, Plaintiff fails to advise the Court that Judge Zilly's
17 decision was subsequently reconsidered and the decision was materially
18 changed. See *Hodgell v. Memolink*, W.Dist.Wa., No. CV02-2183Z, Dkt.
19 No. 23. Judge Zilly initially denied the motion to dismiss by all defendants
20 collectively, and Plaintiff cited only that order. On reconsideration, however,
21 Judge Zilly considered the jurisdictional facts as to each defendant and
22 dismissed two of them for lack of personal jurisdiction. As applied to the
23 present matter, Judge Zilly's opinion supports the parsing of jurisdictional
24

25 ⁴Plaintiffs other attempt to distinguish the *Fenn* case relies on differences between the
26 Utah and Washington laws. However, *Fenn* was decided primarily based upon the fourteenth
27 amendment to the United States Constitution, and the instant motion pertains to the federal
28 constitutional constraints of due process which are unrelated to the state law. Under either state
or federal law, the Court does not have personal jurisdiction over the defendants unless it finds
that the email marketer purposefully availed itself of the forum under applicable federal due
process principles.

1 facts against Virtumundo, Inc., Adknolwedge, Inc., Scott Lynn and his
 2 marital community and the ten John Does separately. The only arguable
 3 jurisdictional facts advanced by Plaintiff pertain to Virtumundo and no other
 4 Defendant, and even those facts do not establish a relationship between
 5 Virtumundo and the state of Washington.

6 Plaintiff also cites to the resolution of his own Motion to Dismiss in the
 7 Eastern District of Washington in a different case. Plaintiff only excerpted a
 8 portion of that order. *See* Siegel Decl. at Exh. B. In truth, personal
 9 jurisdiction was not at issue in that motion; rather, the issue was whether the
 10 plaintiff had failed to state a claim. Accordingly, the Eastern District of
 11 Washington case is wholly irrelevant to the instant motion.

12 **C. CAN-SPAM Requires Only That Defendants Provide an**
 13 **Unsubscribe Link.**

14 Plaintiff argues that Defendants have purposefully availed themselves
 15 because he sent emails to various email addresses at “virtumundo.com”,
 16 although he refused to unsubscribe through the unsubscribe link provided on
 17 Virtumundo emails⁵. Plaintiff argues that his emails “were much clearer and
 18 specific than would be a questionable request to ‘unsubscribe’”. Opposition at
 19 4:4-6. However, the CAN-SPAM Act, 15 U.S.C. § 7701 *et seq*, provides an
 20 unsubscribe link is the federally mandated means to opt-out of receiving
 21 commercial emails.⁶ Pursuant to CAN-SPAM, email marketers may not send
 22

23 ⁵Plaintiff acknowledges that he did not click on the functional unsubscribe link to these
 24 emails, but that he did unsubscribe to emails sent from unrelated third parties. *See* Gordon
 Decl. at page 16.

25 ⁶*See, e.g.*, 15 U.S.C. § 7704 (a): “(3) Inclusion of return address or comparable mechanism
 26 in commercial electronic mail-

(A) IN GENERAL- It is unlawful for any person to initiate the transmission to a
 27 protected computer of a commercial electronic mail message that does not contain a functioning
 return electronic mail address or other Internet-based mechanism, clearly and conspicuously
 displayed, that--
 28

(i) a recipient may use to submit, in a manner specified in the message, a reply

1 messages to the recipients more than 10 days after they opt-out, and the
2 unsubscribe link must remain functional for 10 days⁷.

3 Virtumundo was entitled to rely on CAN-SPAM in managing its email
4 lists and the unsubscribe process. Plaintiff posits that his “Dear Email
5 Marketer” memo is clearer than the unambiguous Federal law providing for a
6 uniform process for unsubscribing to email lists. This theory is specious. The
7 very purpose of a uniform Federal law is to allow business to ensure
8 compliance in every state. Plaintiff’s argument is like an airline refusing to
9 comply with Federal Aviation Administration regulations because the airline
10 thinks its practices are safer.

11 In fact, it is likely Plaintiff did not properly unsubscribe because he
12 wished to pursue litigation to collect statutory damages from email
13 marketers. Plaintiff admits he opted-in to receive emails, but he refused to
14 opt-out. He claims he sent communications to Virtumundo to request it stop
15 sending messages, but he does not provide any evidence that Virtumundo
16 received the alleged requests. Defendants submit that Plaintiff did
17 everything he could to *avoid* cessation of emails because if the emails stopped,
18 then Plaintiff’s alleged damages also would stop. Plaintiff probably opted-in

19 _____
20 electronic mail message or other form of Internet-based communication requesting not to receive
21 future commercial electronic mail messages from that sender at the electronic mail address
22 where the message was received; and

(ii) remains capable of receiving such messages or communications for no less than
30 days after the transmission of the original message.”

23 ⁷See 15 U.S.C. § 7704(a)(4): “PROHIBITION OF TRANSMISSION OF COMMERCIAL
ELECTRONIC MAIL AFTER OBJECTION-

24 (A) IN GENERAL- If a recipient makes a request using a mechanism provided
pursuant to paragraph (3) not to receive some or any commercial electronic mail messages from
such sender, then it is unlawful--

25 (i) for the sender to initiate the transmission to the recipient, more than 10
26 business days after the receipt of such request, of a commercial electronic mail message that falls
within the scope of the request;

27 (ii) for any person acting on behalf of the sender to initiate the transmission to the
28 recipient, more than 10 business days after the receipt of such request, of a commercial electronic
mail message with actual knowledge, or knowledge fairly implied on the basis of objective
circumstances, that such message falls within the scope of the request”

1 because he wished to create a cause of action; and he refused to opt-out
2 because he wished to increase his damages. If Plaintiff sent emails to random
3 “virtumundo.com” email addresses, he did so likely knowing Defendants
4 would not receive them, and to support a form-over-substance argument of a
5 jurisdictional nexus where none exists. Plaintiff’s refusal to follow the CAN-
6 SPAM process, in favor of his alleged (without documentary support) emails
7 to random Virtumundo email addresses, does not satisfy the due process
8 requirements of personal jurisdiction.

10 **III. CONCLUSION**

11 Defendants are not subject to jurisdiction in this forum. Plaintiff does
12 not submit any facts indicating any defendant could reasonably foresee it was
13 sending messages to the state of Washington. Plaintiff’s Opposition pertains
14 only to Virtumundo. There are no alleged jurisdictional facts pertaining to
15 any of the other Defendants. Therefore, Defendants respectfully request this
16 Court dismiss this action with prejudice for lack of personal jurisdiction, and
17 award Defendants their reasonable attorney’s fees pursuant to RCW §
18 4.28.185(5).

20 DATED this 7th day of April, 2006.

22 Respectfully Submitted,

23 **NEWMAN & NEWMAN,**
24 **ATTORNEYS AT LAW, LLP**

26 By:



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